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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938

No. 368

THE CITY OF LOS ANGELES, a municipal corporation, and RAY L. CHESEBRO,

Appellants,

vs.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES AS THE BOARD OF SUPERVISORS OF THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; JOHN ANSON FORD, LELAND M. FORD, HERBERT C. LEGG, ROGER W. JESSUP AND GORDON L. McDONOUGH, as Members of and Constituting the Board of Supervisors of the County of Los Angeles, and *ex officio* the Board of Supervisors of the Los Angeles County Flood Control District,

Appellees.

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

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Appellees.

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

FOREWORD.

Appellees have included in their statement opposing the jurisdiction of this Honorable Court* [R. 116] a motion

*References are to pages of original record.

"to dismiss the appeal or for an order affirming the judgment of the Supreme Court of the State of California." Appellees base their motion upon the following grounds:

1. As to appellant City of Los Angeles, no federal question is involved.
2. Federal questions are foreclosed by previous decisions.
3. Questions involved are too unsubstantial to justify Supreme Court in taking jurisdiction.
4. Determination of nonfederal questions by California Supreme Court sufficient to support its decision.

It is to be noted that the first ground of appellees' motion relates only to the appeal of the City of Los Angeles and not to that of the appellant Ray L. Chesebro.

STATEMENT OF THE CASE.

The case in general involves the validity of the transfer to the Los Angeles County Flood Control District of the works and improvements of certain special assessment drainage districts and the assumption by the Los Angeles County Flood Control District of the outstanding indebtedness of these special assessment drainage districts, without providing an opportunity for the owners of the real property within the Flood Control District to be heard on the question of whether such transfer and assumption of liability would be of special benefit to the lands within the Flood Control District, the Los Angeles County Flood Control District being also a special assessment district. The cause was submitted upon a petition for a writ of mandate and a demurrer thereto. The questions involved are solely questions of law.

1. The Formation of the Special Assessment Districts.

In 1915 the State Legislature created the Los Angeles County Flood Control District (Stats. 1915, p. 1502). The Supreme Court of the State of California, in *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, declared the district to be a special assessment district as distinguished from a taxing district. The area of the Los Angeles County Flood Control District encompasses almost the entire County of Los Angeles, which has an area of approximately 4,000 square miles. The act creating the district is known as the Los Angeles County Flood Control District Act and its pertinent provisions, as amended to date are set forth in the appendix to this brief. Its object and purpose, as set forth in section 2, may generally be described as being to provide for the control and conservation of flood, storm and other waste waters of the district.

Subsequent to the formation of the Los Angeles County Flood Control District the Board of Supervisors formed eleven special assessment drainage districts of limited areas within the territory of the Los Angeles County Flood Control District. Two of these drainage districts were formed under the provisions of the Statutes of 1903, page 354, and seven of them were organized under the Drainage District Improvement Act of 1919 (Stats. 1919, p. 731). These two statutes, the first of which was superseded by the second, authorize county boards of supervisors, upon petition of landowners, to form drainage districts, after giving proper notice and holding hearings thereon. The validity of Drainage District No. 1 was attacked in *Van de Water v. Pridham*, 33 Cal. App. 253, on the ground that the Statutes of 1903, page 354, authorizing the formation of drainage districts upon petition of landowners, no

longer applied to the territory embraced within the Los Angeles County Flood Control District; however, the validity of the formation of Drainage District No. 1 was upheld and the statute declared to be still operative within the territory of the Los Angeles County Flood Control District on the theory that drainage districts formed under the statute serve a purpose different from that of the Flood Control District and take care of the peculiar needs of a local area within the Flood Control District.

2. The Transfer of the Drainage Districts' Works to the Los Angeles County Flood Control District.

In 1937 the legislature amended the Los Angeles County Flood Control District Act (Stats. 1915, p. 1502) by a statute adding section 13½ to the Act (Stats, 1937, p. 1763). Section 13½ provides that:

> "The board of supervisors of said Los Angeles County Flood Control District, by a four-fifths vote, may accept on behalf of said district a transfer of and conveyance of all, but not less than all, storm drain improvements, drainage improvements or drainage systems lying within the territorial limits of the flood control district and within any of the following described classes, to-wit: * * *"

Then follows a description of four classes of structures which may be summarized as being those constructed and maintained under the authority of the county board of supervisors; those constructed by or for the County, any drainage district within the county, or the Los Angeles

Flood Control District; those constructed prior to January 1, 1937, under the 1903 or 1919 drainage district acts (Stats. 1903, p. 354; Stats. 1919, p. 731); those within any municipality within the county whose governing body has transferred the drainage works of the municipality to the Flood Control District.

Section 13½ further provides that upon any such transfer being made the Flood Control District "shall thereupon be and become liable for the payment of the principal upon the bonds of such drainage improvement districts maturing subsequent to the date of such conveyance and upon the indebtedness of such drainage improvement districts represented by interest coupons maturing subsequent to such date of transfer"; that special assessments shall be levied on lands within the Flood Control District to meet these obligations; and that the future maintenance of these structures so transferred shall be the obligation of the Flood Control District, authority being also given to levy special assessments throughout the Flood Control District for this latter purpose.

On December 1, 1937, the Board of Supervisors of the County of Los Angeles transferred the structures of these eleven drainage districts to the Los Angeles County Flood Control District, as set forth in the resolution incorporated in the petition for the writ of mandate as Exhibit "A" [R. 9]. Although appellees sought to justify their action under the asserted authority of other sections of the Los Angeles County Flood Control Act (Stats. 1915, p. 1502), the Supreme Court of the State

of California, in its decision, held that "the petition disclosed an intent on the part of the Board of Supervisors to proceed pursuant to the power vested in it by said section 13½." [R. 82.] It therefore follows that if the transfer is valid the outstanding obligations of the drainage districts and the future maintenance of their works are assumed by the Los Angeles County Flood Control District by operation of law.

3. Appellants' Contentions.

The substance of appellants' contentions is this: That while the Los Angeles County Flood Control District was created by the legislature and the question of special benefit to the lands within the district was thereby determined by that body at the time of the adoption of the act creating the district, yet this does not permit the legislature to later amend the act so as to grant to a county board of supervisors, clothed only with *quasi-judicial* and administrative powers in the matter, unlimited discretionary power to acquire on behalf of the district, various types of structures, including those of other special assessment districts created by the board of supervisors upon petition of property owners within the district, the validity of whose organization is based upon the fact that they serve a purpose different from that of the Flood Control District and are of benefit only to limited areas within the Flood Control District, without the legislature providing for notice and an opportunity for property owners within the Flood Control District to be heard upon whether a transfer of

these structures to the Flood Control District will be of special benefit to the lands within the Flood Control District.

4. Appellees' Contentions.

Appellees contend that the granting of discretionary power to the county board of supervisors to acquire these classes of structures on behalf of the Los Angeles County Flood Control District is but an additional grant of power to the governing body of the Flood Control District which the legislature itself created and that therefore it is not essential that provision be made for notice and an opportunity for property owners within the Flood Control District to be heard before such structures may be transferred to the Flood Control District; and that by granting such discretionary power to the board of supervisors the legislature impliedly determined that structures of the classes mentioned in the section, if acquired by the Flood Control District, would be of special benefit to it. Appellees further contend that section 13 of article XI of the Constitution of the State of California gives the legislature plenary power over drainage districts and that the enactment of section 13½ of the Los Angeles County Flood Control District Act is but the exercise of that plenary power.

ARGUMENT.

This brief being one in opposition to appellees' motion to dismiss the case, appellants will address their argument first to the question of whether a federal question is involved with reference to the appellant City of Los Angeles, and then, in the order indicated, to the question of whether the issues presented are foreclosed by previous decisions of this Honorable Court, or are of a substantial nature, and whether the decision of the Supreme Court of California may be upheld on nonfederal grounds.

POINT I.

The Rights of the City of Los Angeles Involved in This Case Are Within the Protection of the Constitution of the United States and a Federal Question Is Therefore Presented.

In the petition for writ of mandate [R. 1] it was alleged, in paragraph VII [R. 6], that the levy of special assessments by the Flood Control District to meet the obligations of the drainage districts, whose works were transferred to the Flood Control District, will be without regard to the accrual of benefits to the lands assessed and will deprive petitioners of their property without due process of law and deny them the equal protection of the laws in violation of the provisions of article V and article XIV of the Amendments to the Constitution of the United States and section 13 of article I of the Constitution of the State of California. The Supreme Court of California, in its decision [R. 81], recognized the claim of petitioners that the threatened levy of the special assessments under the statute complained of would constitute a "denial of due process and the equal protection

of the laws enjoined by the state and federal constitutions," [R. 83] but proceeded to hold that special assessments so levied would not constitute a denial of due process and the equal protection of the laws.

In recognizing the right of the City of Los Angeles, in the case at bar, to assert rights protected by the Constitution of the United States, the Supreme Court of California was but following the rule laid down at an early date in the judicial history of California in *Grogan v. City of San Francisco* (1861), 18 Cal. 590. In that case the Supreme Court of California held that the legislature was without power to divest the City of San Francisco of rights granted to it by an earlier statute conveying certain property to the city for its use and occupation for a period of ninety-nine years, as it would be violative of rights protected by the Constitution of the United States. It was there said, commencing at page 612:

> "* * * The estate having vested in the city, ceased to be subject to the legislation of the State, except to the same extent that all property is thus subject. It could not be afterwards divested by the State, or by any proceedings instituted by her direction. '* * * Nor is there any difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation.' * * * The authorities are all to the same purport. A legislative grant is an executed contract, and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. This was expressly decided by the Supreme Court of the United States in *Fletcher v. Peck,* 6 Cranch. 137. It cannot therefore be de-

stroyed, and the estate be divested by any subsequen legislative enactment. And though a municipal cor poration is the creature of the Legislature, yet whe the State enters into a contract with it, the subordi nate relation ceases, and that equality arises whic exists between all contracting parties. And howeve great the control of the Legislature over the corpor ation, it can be exercised only in subordination to th principle which secures the inviolability of contract* * *

"The cases of *Hart v. Burnett,* 15 Cal. 530, an *Payne v. Treadwell,* 16 Cal. 222, cited by the coun sel of the appellant, do not conflict with the view we have expressed as to the authority of the Legis lature over the property of a municipal corporation They both treat of lands held by the city of Sa Francisco as successor of the former pueblo, and o the power of the Legislature to validate a grant o such lands previously made by the act of the city Those lands were held by the pueblo, and the city a its successor, in trust for public municipal purposes and the trust was subject to the direction, supervi sion, and control of the Government. The cases cite have no application to a case like the present, when the Legislature has undertaken to divest property which is not held upon any such trusts, without th city's previous consent, or the city's subsequent ac ceptance of its act."

It is thus seen that in California the rule is clearl laid down that while the legislature may control municipal ties in so far as they act as agents of the state in the ad ministration of public affairs, yet as regards propert rights of municipalities vested in them for their own cor

porate advantage they are of such nature as to be within the protection of the Constitution of the United States and not subject to invasion by the legislature in a manner prohibited thereby.

In *City of Beverly Hills v. City of Los Angeles* (1917), 175 Cal. 311, the Supreme Court of California had under consideration the right of the City of Los Angeles to maintain water mains in the streets within the limits of the city of Beverly Hills under an act of the Legislature (Stats. 1911, p. 852) which provided "That there is granted to every municipal corporation of the State of California the right to construct, operate and maintain water and gas mains * * * along or upon any road, street * * *." In discussing the nature of the right acquired by the City of Los Angeles, it was said, at page 314:

> "The grant resulting from defendant's acceptance of the state's offer constituted a contract, the property right in which is protected by the federal Constitution * * *. No doubt exists as to the power of the state to make the grant, which, when accepted as we have seen, constituted an inviolable contract * * * ."

The same rule (including the exception as to governmental affairs) is recognized in Massachusetts. In *Proprietors of Mt. Hope Cemetery v. City of Boston* (1893), 158 Mass. 509, it is stated, at page 511:

> "Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public,—that is, which the city or town holds merely as an agency of the state government for the per-

formance of the strictly public duties devolved upon it,—the legislature may exercise a control, to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government, appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. * * * By a pretty general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes, not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation."

In *City of Boston v. Jackson* (1922), 260 U. S. 309, it was pointed out that where the courts of a state assume that a municipality has rights protected by the Federal Constitution, this Honorable Court will assume likewise, reserving to itself, however, the power to decline to follow the state court. In that case, it was said, at page 316:

"In this conclusion, we assume, as did the supreme judicial court, that the state may confer on one of its subdivisions, like a city or town, the private proprietary capacity by which it may acquire contract or property rights protected by the Federal Constitution against subsequent impairment by its creator, the state."

In *Railroad Commission of California v. Los Angeles Railway Corp.* (1929) 280 U. S. 145, this court had under consideration the question of whether the City of Los Angeles had power to enter into a contract fixing maximum fares in street railway franchises as distinguished from the mere regulatory power to fix fares which might be changed or abrogated under the police power of the state without violating the contract rights of the city. It was there pointed out, at page 152, that:

> "This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. Ed. 1065, 1073, 43 Sup. Ct. Rep. 613."

In *Georgia Railway & Power Co. v. Town of Decatur* (1923), 262 U. S. 432, a similar question as to the nature of a provision in a street railway franchise fixing maximum fares was presented. It was said in that case, at pages 437 and 438:

> "* * * This contract has been before the supreme court of Georgia in the course of litigation on three distinct occasions: 149 Ga. 1, 5 A. L. R. 1, P. U. R. 1919D, 546, 98 S. E. 696; 152 Ga. 143, 108 S. E. 615; and (the instant case) 153 Ga. 329, 111 S. E. 911. * * * This conclusion, involving, as it does, a construction of the state Constitution and laws and powers of state municipalities, is controlling upon this court, as it has decided many times. * * *
>
> "On the other hand, in deciding the constitutional questions presented, this court will determine for itself whether there is, in fact, a contract, and, if so, the extent of its binding obligations; but will lean to an agreement with the state court. * * * And

considering the question in this light, we see no reason to differ with that court in its view of the validity and binding quality of the contract."

Appellees reply upon *City of Trenton v. State of New Jersey* (1923), 262 U. S. 182, for the proposition that the rights and property of municipalities are subject to state control exclusively. In that case, however, the Court of Errors and Appeals of New Jersey held (*State v. City of Trenton*, 97 N. J. L. 241) that the city of Trenton could not object that its rights were unconstitutionally invaded, it being said, at page 246 of 241 N. J. L. Reports:

> "But the logical, and as it seems to us conclusive, answer to the defendants' contention is that they are not only subsidiary political divisions of the state, exercising their delegated powers, presumably and exclusively in the public interest, but *ex necessitate* their business and property are thereby expressly affected with a public interest; and under well-settled rules of law become thereby subject to the exercise of the police power when exerted by the state in behalf of the general body politic."

This court, in pointing out the law of New Jersey upon the subject, said, at page 187 of 262 U. S. Reports:

> "In New Jersey it has been held that, within the limits prescribed by the state Constitution, the legislature may delegate to municipalities such portion of political power as they may deem expedient, withholding other powers, and may withdraw any part of that which has been delegated. Van Cleve v. Passaic Valley Sewerage Comrs., 71 N. J. L. 183, 198, 58 Atl. 571."

In holding, therefore, that the City of Trenton had no rights involved which were within the protection of the 14th Amendment to the Constitution of the United States, this court was but following its well-settled rule of adhering to the decisions of the highest court of a state declaring the rights of municipalities of that state.

Appellees cite *Hunter v. City of Pittsburg* (1907), 207 U. S. 161, which involved the validity of a statute under which the cities of Pittsburgh and Allegheny were consolidated into one municipal corporation. Taxpayers of the City of Allegheny attacked the consolidation upon "the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated" (p. 177), and that plaintiffs were deprived of their property without due process of law by subjecting them to the burden of the additional taxation which would result from the consolidation. It was in connection with this issue that this court pointed out that a state may, at its pleasure, modify or withdraw all powers of a governmental nature from municipal corporations; however, this court pointed out that this power of the legislature appears to extend only to activities of municipal corporations when acting in a governmental capacity, it being said (at page 179):

> "It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that

> property is held by private corporations or individuals. * * * If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based have several times been noticed."

It was pointed out that the City of Allegheny had made no allegation that it had been deprived of its property without due process of law nor was it apparent from the facts that the city was in a position to make such a contention. As to the plaintiff taxpayers, it was held that

> "Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences."

It is therefore apparent that in so far as the dictum of this case is concerned it tends to support the contentions of appellants rather than those of appellees.

City of New Orleans v. New Orleans Water Works Co. (1891), 142 U. S. 79, is also referred to by appellees. In that case the charter of the water works company, granted in 1877, provided that the property of the company should be exempt from taxation in consid-

eration of furnishing the City of New Orleans with water free of charge. The purported exemption from taxation was void and the city sued for taxes due and the water company sued for the value of the water furnished the city. On appeal, the Supreme Court of Louisiana modified the judgment so that the charge for water offset the amount of taxes due the city. Later an Act of the Legislature was adopted, in 1884, providing that the city should pay for water supplied to it during any year for which taxes had been levied for municipal purposes, and, pursuant to such statute, the city entered into a contract with the water company. Certain taxpayers brought suit to enjoin making any appropriation under the contract on the ground that the Act of the Legislature was unconstitutional and therefore void. In dismissing the case, it was said, at page 83:

> "* * * Was there a federal question involved in this case? None such appears upon the face of the bill, the basis of which is a conflict between the Act of 1884, and the ordinance and contract thereunder, and the constitution of the State. Four clauses of the constitution are cited, all of which this Act is alleged to violate; but in none of them is there a suggestion of a conflict with the federal constitution or laws."

On the question of whether a municipality may have rights protected by the Federal Constitution, that case seems to support appellants' position rather than that of appellees. In pointing out that the original contract created by the charter of the water company was void and had been repudiated by the city, this court held in effect that the subject-matter thereof related to the capacity of the city as an agency of the state and was

therefore subject to modification by the legislature, but that private or proprietary rights of a city may be entitled to protection under the Federal Constitution, it being said, in this regard, at page 91:

> "* * * But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, *while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection.*" (Italics ours.)

The case of *Barnes v. District of Columbia* (1876), 91 U. S. 540, cited by appellees does not involve a consideration of any rights of a municipality protected by the Federal Constitution. The question there involved was the liability of the District of Columbia as a municipal corporation for injuries resulting from the dangerous and defective condition of its streets. The discussion of that case centered around whether the source of the power of appointment of municipal officers had any effect upon the liability of the municipality for their negligence in performing their official duties.

City of Tulsa v. Oklahoma Natural Gas Co. (1925), 4 Fed. (2d) 399, a decision of the District Court of the Eastern District of Oklahoma, cited by appellees, is a case wherein the City of Tulsa had granted a franchise to the gas company, with a stipulation as to the rate to be charged the city and its inhabitants. Subsequently the state legislature passed a law transferring to the Cor-

poration Commission jurisdiction over public utilities and the regulation of rates, and the Corporation Commission raised the rates. The City of Tulsa argued that the rate provisions of the franchise constituted an inviolable contract but the court held that the city had no rights protected by the Federal Constitution, citing such cases as *City of Trenton v. State of New Jersey (supra)*, 262 U. S. 182. The question presented in that case was not whether the gas company was compelled to furnish gas at the rates specified in order to retain its franchise. The question was whether the rate agreed on between the gas company and its consumers was subject to modification by the state in the exercise of its police power. It seems to be well settled that contracts for public service are made with the implied provision that the rate agreed on is subject to change by the state in the exercise of the police power. (See Annotation to *Railroad Commission of California v. Los Angeles Railway Corporation*, in 74 U. S. Rep., Law. Ed. 234, 238, 305, 316.) It would therefore appear that the decision of the District Court must of necessity have been the same even if the suit had been brought by a private party. Moreover, the District Court was considering the question in an original proceeding and did not have before it any decision of the state courts holding that the City of Tulsa had rights which were of such nature as to be within the protection of the Federal Constitution, as in the case at bar, and in *City of Boston v. Jackson (supra)*, 260 U. S. 309.

Appellees cite *Bulkeley v. Williams* (1896), 68 Conn. 131, wherein the legislature shifted the cost of a bridge and highway from the state to certain municipalities. "In behalf of the town it is contended that it cannot thus be compelled to contribute, at the dictation of officials not of

its own choosing, to the cost of maintaining a highway which is wholly outside of its territorial bounds" (p. 148). In disposing of this contention, it was said, at page 148:

> "* * * As against legislation of this character, American courts generally hold that no plea can be set up of a right of local self-government, implied in the nature of our institutions. * * * No right, as against a state, to the equal protection of the laws, is secured to its municipal corporations by this amendment, which can limit in any way legislation to charge them with public obligations. * * * The town can found no claim, under the Constitution of the United States, any more than under that of Connecticut, to such right of local self-government as precludes the general assembly from exacting this payment, notwithstanding the demand comes from another municipal corporation, the bridge district, in choosing whose members or directing whose affairs it has had no share."

It is thus seen that the Supreme Court of Connecticut was speaking of a public obligation placed upon the town as an arm of the state. Moreover, whatever the courts of Connecticut may say as to the rights conferred on municipalities of that state, the same are to be disregarded if in conflict with the decisions of California courts, in so far as the case at bar is concerned.

City of St. Louis v. Shields (1873), 52 Mo. 351, cited by appellees, is also a case wherein a state court determined the nature of the rights of a municipality in the subject-matter of the action, namely, subsequent legislation withdrawing from the City of St. Louis the right to collect wharfage, which was held to be merely a privilege granted to the city which the legislature could withdraw at any time.

The case of *Police Jury v. Shreveport* (1850), 5 La. Ann. 661, is likewise a case where a state court was, at most, construing the nature of rights conferred upon the municipalities of the state as against the contention that the withdrawal of an exclusive ferry franchise from the City of Shreveport constituted an impairment of a contract under section 1 of the Tenth Amendment. Again, it is to be noted that the decisions of the courts of Louisiana defining the rights of municipalities of that state have no bearing upon the case at bar as it is for the courts of California to define the rights of municipalities existing under the laws of California.

Appellees contend that as between a municipality and the state their relations are matters of local law not subject to review by this court, citing *City of Pawhuska v. Pawhuska Oil & Gas Co.* (1919), 250 U. S. 394. In that case, as in the case of *City of Trenton v. State of New Jersey (supra)*, 262 U. S. 182, the highest court of the state denied the existence of the right which the City of Pawhuska sought to enforce, namely, the right of the city to regulate the charges made for service by public utilities using the city streets under franchise unaffected by a subsequent transfer of that right to the State Corporation Commission. "Or, stating it in another way, the contention of the city was and is that the authority to regulate the rates and service, which concededly was reserved at the time the franchise was granted, was irrevocably delegated to the city by the Constitution and laws of the state, and therefore that the exertion of that authority by any other state agency, even though in conformity with a later enactment of the legislature, operated as an impairment of the franchise contract." The State Supreme Court decided adversely to such contention, and, in dismissing the case, this court pointed out (p. 397):

(D) WITH RESPECT TO THE TRANSFER OF THE OBLIGATIONS AND COST OF MAINTENANCE OF THE DRAINAGE DISTRICTS TO THE FLOOD CONTROL DISTRICT, THE BOUNDARIES OF THE DISTRICT TO BE ASSESSED WERE NOT DETERMINED BY THE LEGISLATURE BUT BY A LOCAL ADMINISTRATIVE BOARD.

The legislature did not *command* the Board of Supervisors to transfer drainage districts to the Flood Control District. The legislature merely authorized such transfers to be made if the Board of Supervisors so desired. The effect of this is to place in the discretion of the Board of Supervisors the power to limit the assessments of the special assessment drainage districts to lands within the boundaries of the respective drainage districts theretofore established or to spread such assessments over the entire area of the Flood Control District. Under these circumstances it may not be logically argued that the legislature has determined what lands are to be assessed for the improvements of the respective drainage districts and consequently it may not be argued that by *authorizing* the transfer to be made the legislature has determined what lands will be benefited by the drainage district improvements.

It seems to be clear that where the legislature authorizes a local board to do a particular thing, in its discretion, or by a vote of the electors of a district, action taken pursuant to such authorization is not an act on the part of the legislature.

The principle appears to be well established that when the legislature merely authorizes an act to be done the doing of such act is not by the legislature but by the agency upon whom the authority to act has been conferred.

In *Swanson v. Therrell* (1933), 112 Fla. 474, a statue was held void for failing to provide for proper notice and hearing on the question of benefits to lands proposed to be assessed by a port district. The legislature sought to readjust special assessments by changing them in part from a basis of general benefit to the entire district as a whole, to an apportionable special benefit assessment against the properties in the district severally. In the statute the legislature expressly determined that certain lands were benefited specially in addition to the general benefits received by all lands within the district. However, the statute provided that it should "not become effective until the same shall have been approved or ratified by a majority of the qualified electors * * * of the Broward County Port District * * * if twenty-five per cent (25%) of the qualified voters * * * shall petition * * * for such an election within fifteen (15) days after the passage of this Act"; and that if no such petition is filed within that time "this Act shall become a law and be operative at the expiration of said fifteen (15) days."

In holding that there had been no legislative determination of benefits, in spite of the express declaration to such effect, it was said, commencing at page 478:

> "An act of the Legislature undertaking to make a legislative determination of benefits to properties situated within a special taxing district, whether in the aggregate, or severally, as to affected properties, is in its essence such a statute as cannot be constitutionally made contingent on the results of a referendum election for its ratification as an ordinary legislative act can be on matters of general legislative concern, as has been upheld in State ex rel. Cheyney v. Sammons, 62 Fla. 303, 57 So. 196.

"The reason for this is obvious. Affected property owners of a special taxing district possess the constitutional right to have the amount of special benefits, and the individual apportionment thereof, determined by the judgment of the Legislature itself on this question, which is a determinable question of fact. In lieu of such direct determination by the Legislature itself, a tribunal of some sort must be provided for or set up by the Legislature, and vested with power to accord a full hearing to property owners on all the elements of benefit required to be considered by the law-making power, before a valid and binding apportionment and assessment of special benefits can be constitutionally accomplished and made conclusive on the property owner. Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369. * * *

"A legislative determination of special benefits to specially assessed properties situate in a special taxing district is essentially, from the very nature of the legislative function involved in a matter of that kind, a proposition which the Legislature alone is empowered to act upon. Being an ascertainment of a fact, the ascertainment of which is required to be made by law in order to constitute due process (where notice and opportunity to be heard on the question is not otherwise provided for), the effectiveness of such ascertainment when legislatively made cannot be made to depend upon the happening of a contingency, such as the favorable vote of a referendum election on the question of whether or not the act including the legislative ascertainment shall become effective at all.

"To say that an act of the Legislature relating to a duty required to be performed, or a power required to be exercised, according to the judgment of the Legislature alone as a matter exclusively within the

> Legislature's sovereign power, is capable of being made to become effective only upon its subsequent approval by the ratifying vote of the electors of a particular district with relation to which the legislative determination is required to be made, is to completely ignore the constitutional nature and character of the legislative function which is being exercised when a legislative act of this character is passed."

In *Redman v. Kyle* (1918), 76 Fla. 79, it was held that a statute creating a drainage district was void because it gave the supervisors of the district discretionary power to levy assessments up to fifty cents an acre for preliminary expenses without providing any opportunity for property owners to be heard on the merits of the assessment. In holding that a demurrer to a bill seeking to enjoin an assessment for preliminary expenses of the district was improperly sustained, it was said, commencing at page 81:

> "* * * This district was established directly by the Legislature by chapter 7430, Acts of 1917, and its territorial boundaries therein definitely prescribed, embracing land lying within the counties of Broward and Dade. A governing body, consisting of three members designated as a board of supervisors, was created, and its members specifically named in and by the act; * * * said board, immediately after the organization of the said district, without notice to the owners of land within the district, levied a uniform tax of 25 cents per acre upon each acre of land within the district, under the provision of section 7 of said act, which prescribes that the board of supervisors of the district, as soon as organized, shall levy a uniform tax, not exceeding 50 cents per acre, upon each acre of land within the district, which tax shall become a lien upon the land upon which it is assessed from the date of its assessment. * * *

at page 84:

"There is no provision in the act as to the method or manner in which the amount of such preliminary expenses are, even approximately, to be ascertained by the supervisors. Upon the assumption that the assessment or tax provided for in section 7 of the act is legal and valid, there is ample authority, as far as the act is concerned, for the supervisors to fix such tax at any amount up to 50 cents per acre on the lands within said district, and this they may do without any inquiry or investigation, arbitrarily and in secret, if they choose, without notice to any person or affording an opportunity for a hearing of the landowners in the district, who may be required to pay these expenses, and who, it is to be presumed, are not only materially and vitally interested in the result of the drainage and reclamation plan to be adopted and followed, but who are also equally interested in seeing that these preliminary expenses are no greater than the necessities of the case require.
* * *

"It is not here disputed that the Legislature may impose a special assessment and fix the rate thereof on lands in a duly established drainage district by the valid exercise of its legislative power, without giving notice to, or affording an opportunity to be heard by, the owners of the land upon which such assessment is imposed. But it was said in Lainhart v. Catts, 73 Fla. 735, 75 South. 47, text 55:

" 'There is a wide difference between a special tax or assessment for local improvements prescribed by the legislative body, having full authority over the subject, and one dependent upon the judgment and actions of bodies or instrumentalities acting under delegated powers.'

"Where, as in the present case, the tax is levied upon land at a rate not specifically fixed by the legislative body, but which rate is fixed by a board of supervisors, dependent upon the amount to be raised for the stated purposes, involving, at least, an estimate and an exercise of judgment by such board, it would be a dangerous doctrine to hold that absolute power resides in such a tribunal, to levy a tax in any such amount as it might choose, even if within restricted limits, without giving notice to the owner of such land and affording him an opportunity of being heard as to the necessity of raising the amount determined upon by such body. It would be a power which could, and indeed is likely to, be greatly abused, and the general principles of law applicable to such bodies are opposed to the exercise of any such powers. In the absence of a provision for the enforcement of the assessment in the nature of a judicial proceeding, in which notice is given to the property owner and a full and fair opportunity afforded him to be heard upon the merits of the assessment, it is manifestly proper that before the tax is levied and becomes a lien upon the land, as a result of the determination of some body or instrumentality acting under delegated powers, those who are to pay the tax or who own land against which the assessment is to be enforced should have notice of the tax to be imposed and have an opportunity of being heard as to the amount necessary to be raised for the purposes stated in the statute. * * *"

At page 87:

"The case of Lainhart v. Catts, 73 Fla. 735, 75 South. 47, also cited by appellees as being opposed to appellant's contention, is not in point, as the tax or assessment considered in that case was fixed at a

definite, stated amount by the Legislature, leaving nothing to be determined by any subordinate body acting under delegated power, before the tax should be levied. In the instant case, the supervisors are to determine, not only the aggregate amount to be raised for the preliminary expenses to be incurred under section 7 of the act, but, in making up such amount, they are to determine the various amounts to be expended for the several items mentioned as constituting such preliminary expenses, and to raise such amounts may impose such rate of taxation not to exceed 50 cents per acre as they may choose. Under such circumstances, it is held in Londoner v. City and County of Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, that:

"'Where the Legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessments and apportionment, due process of law requires that, at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice.'"

In *Flynn v. Chiappari* (1923), 191 Cal. 139, the court had under consideration a procedural street improvement ordinance of San Francisco. San Francisco is a consolidated city and county government, the only one of its kind in the state. It is governed by a board of supervisors. The ordinance in question provides for street improvements to be initiated by the board of public works' declaring the expediency of a proposed improvement, and, after notice and a hearing thereon, recommending the

same to the board of supervisors. The ordinance provides that the expense shall be borne by a district, if, in the opinion of the board of public works, the improvement is of more than local or ordinary public benefit, and that the district shall be described in the notice. Otherwise, the expense shall be met by assessments levied on a "front foot" basis, except that if there be an improvement of such nature that these two methods are not sufficient "to authorize the board of public works to make an assessment to pay for the expenses thereof, then said board shall, before it passes a resolution of its intention to recommend the ordering of said work or improvement, establish by resolution a method by means of which such assessment shall be made." The ordinance does not require that notice and a hearing be given to property owners by the board of public works in adopting a method of assessment. In holding that this provision for the adoption of a method of assessment by the board of public works was void for want of provision for notice and hearing, the court referred to the rule that notice is not required where the legislature itself determines the proprty to be benefited or provides a rule by which it is to be determined by a body exercising delegated legislative power, but pointed out that (p. 146):

> "* * * It is also true that for the purposes of the instant case the board of supervisors is the legislature. (*Larson v. San Francisco, supra.*) But the supervisors in this case did not determine either the property to be charged or the benefits to be charged against it, nor did they fix any rules by which these were to be determined. These were determined by

the board of public works, and never even reported to the supervisors.

"Where, as here, the determination of the property to be charged and the benefits to accrue thereto is committed to an administrative board, due process requires that the property owners affected thereby shall be given adequate notice and an opportunity to be heard upon both these questions. (*Brooks v. City of Oakland*, 160 Cal. 423 [117 Pac. 433]; *People v. Van Nuys Lighting Dist.*, 173 Cal. 792 [Ann. Cas. 1918D, 255, 162 Pac. 97].)"

The same idea was expressed in *Miller & Lux v. Board of Supervisors* (1922), 189 Cal. 254 wherein it was pointed out that, where the legislature does not describe the district or decide that any particular land will be benefited, it is necessary to give a hearing upon the question of benefits and that acts performed without such a hearing being had could not be validated by subsequent legislation in which the findings of a local board are adopted by the legislature, because (p. 277):

"* * * In the first place the conclusive presumption indulged in by the courts to the effect that the legislature had duly considered the benefits to be derived by the lands included within the district is hardly applicable when the legislature expressly adopts the findings of the board of supervisors as to benefits."

Attention is also respectfully called to the case of *State v. McGuire* (1909), 109 Minn. 88, wherein it is said, commencing at page 91:

"We are of opinion that the statute, in so far as it attempts to clothe the board of commissioners with

ex parte power and authority to enlarge, by widening or deepening, a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required by the statute to defray the expense of the improvement, or afford them an opportunity at some stage of the proceedings to be heard upon all questions necessary to be determined in order to justify the proposed work. It is clear that the original proceeding could not be authorized by the Legislature without some provision for notice or opportunity to be heard upon these questions (28 Cyc. 979; Hamilton on Special Assessments, 141); and it is equally clear that the enlargement of a ditch already constructed, either by widening or deepening it, would, for all practical purposes, constitute a new ditch, depending, perhaps, upon the extent of the enlargement, * * *

"If the statute under consideration authorized ordinary repairs only, such as removing obstructions and accumulations of foreign substances in the ditch, we would follow the rule of the Iowa court, and some of the other states, to the effect that provision for notice to the owners of adjoining property is not essential to the validity of the statute. * * *

"* * * And, as suggested, if this statute were so limited, notice would be held unnecessary. But it is not so limited. On the contrary, the statute not only authorizes repairs, but grants to the board the further power to enlarge the ditch by widening its banks or deepening its channel. And, respecting this additional power, it contains no limitation respecting the extent to which the board may go. Under its authority an existing ditch may be widened or deepened one, two, or more feet, depending upon the

> arbitrary action of the county board, guided in the main, perhaps, by recommendations of their engineer. Clearly this should not be authorized without notice to those who must in the end defray the expense."

The Constitution of the State of Montana prohibits the legislature from passing any law "which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." In holding that an act of the legislature which authorized the assumption by municipalities of the payment of bonds and warrants of local improvement districts theretofore created, if a majority of the tax-paying electors should consent thereto, was not in violation of this constitutional prohibition, it was said, in *Stanley v. Jeffries* (1929), 86 Mont. 114, at page 133:

> "Herein the Legislature did not attempt to impose a liability upon the people with respect to past transactions, but merely gave them the option to impose such a burden upon themselves if they saw fit, which, in so far as this inhibition of the Constitution is concerned, they may do."

The same reasoning was followed in *Ames v. Mathews* (1930), 99 Fla. 1, in determining whether certain obligations were incurred for local, as distinguished from state, purposes. In that case, the court was called upon to determine whether a statute providing that gasoline tax revenues should be apportioned to counties in proportion to their bonded indebtedness for roads and bridges was violative of a constitutional provision prohibiting the use

of state taxes for local purposes. In holding that the use of tax moneys for the payment of such road and bridge bonds would be for a local purpose, it was pointed out that the legislature might have provided for the construction of the roads and bridges in the first place but that it did not do so, and that (page 23):

> "The counties and districts could have refrained, but they did not; they borrowed the money by issuing bonds, and constructed the roads. The Legislature merely authorized; it did not compel. So each of the counties and districts, of its own choice, took the necessary steps to issue the bonds upon the ground that the construction of the roads in question constituted a county (or district) purpose, which it was, although the same construction projects might have been accomplished by the state as a state purpose."

From the foregoing authorities, it seems clear that where the legislature authorizes, as distinguished from a command, something to be done by an inferior board or tribunal, the act done pursuant to such authorization is that of the inferior board or tribunal and not of the legislature.

For the reasons as stated, appellant respectfully submits that section 13½ of the Los Angeles County Flood Control Act (Stats. 1937, p. 1763) is invalid for the failure to insert therein provision for notice and hearing before the obligations created by the Board of Supervisors of the Los Angeles County Flood Control District under the authority of that section become a lien upon the lands assessed in accordance with its provisions.

POINT II.

The Supreme Court of the State of California Erred in Holding That by Designating the Classes of Structures Which Might Be Transferred to the Los Angeles County Flood Control District at the Discretion of the Board of Supervisors of Los Angeles County It Is to Be Presumed That the Legislature Concluded That the Los Angeles County Flood Control District Would Be Benefited by the Structures of Such Classes If and When They Should Be Acquired on Behalf of the Flood Control District.

The Supreme Court of the State of California stated, in its decision rendered in the case at bar, that:

> "* * * By designating in section 13½ the particular property which may be acquired by the flood control district it must be presumed that the legislature concluded that the entire flood control district would be so benefited by the use of the designated drainage improvements in the larger and broader program of the flood control act." [R. 24.]

The error in this conclusion lies in the fact that section 13½ of the statute designates drainage improvements exclusively by the statutory authority under which they were created. The statute contains no reference whatsoever to the physical character of such improvements. In determining the question of whether a particular improvement is of benefit to a locality, the governing factor is the design and construction of the improvement, and not the authority by which it was designed and constructed.

This reasoning on the part of the Supreme Court of California is but an ineffectual attempt to bottom the authorization for the transfer on a theory of benefit to the additional lands assessed. In other words, the court was making a vain attempt to avoid the logic of its previous decision in *Reclamation District v. Birks* (1911), 159 Cal. 233. In that case the legislature created Reclamation District No. 70 (New 70), which embraced within its limits Swamp Land District No. 70 (Old 70) and another reclamation district. In holding that an assessment could not be levied on lands in the new district for the purpose, in effect, of meeting the debts of the swamp land district, which formed only a part of the new district, it was said, commencing at page 239:

> "* * * If the reclamation work which Old 70 did was of value before its absorption into the new district, it became of no less value by the change of management. The property-owners of Old 70 are still receiving all the benefits which may follow the works of reclamation which they constructed, and it is but just that they should be called upon to do what originally they undertook to do,—namely, to pay for those works. Upon the other hand, it would be most manifestly unjust, if not illegal, to impose upon all of the land of the new district the cost of the reclamation works which had been constructed by the old district. The old district forms but a part of the territory of the new district. Much of the land of the new district could not be benefited by the reclamation works of the old district, and to declare that the debt of the old district was a debt of the new, or to do, in effect the same thing as the trustees here undertook to do, by purchasing the property of the old district, would result in imposing a lien upon lands under the guise of special benefits, which lands

could, in the very nature of things, receive no benefit from the work. To illustrate: Conceive the case where a reclamation district has incurred an indebtedness for reclamation works which have proved inefficient and abortive; the debt remains, and the work is entirely without benefit, even to the district which ordered it. If by the creation of a new district, embracing the territory of the old, it were sought to be held that the debts of the old district, by operation of law, became the debts of the new, it would result in imposing a *pro rata* proportion of that debt upon land never within the scheme of reclamation when the debt was incurred—land which was not in fact benefited, and which it was never in contemplation could be benefited. Thus gross wrong would be perpetrated upon property-owners, in absolute violation of the law which justifies the imposition of this species of tax burden solely upon the theory that their land will derive a commensurate amount of benefit from the work for which the assessment is levied.

"There is no denial in this of the power of the legislature to apportion indebtedness where the boundaries of municipal or *quasi* municipal corporations have been changed, where one has been absorbed by another, where two or more have been consolidated, or where a different class or kind of municipal corporation has been created which comprises the territory of a formerly existing corporation. (28 Cyc. 175 *et seq.*) The principle which is here announced is simply this, that where a debt has been imposed upon the property of a *quasi* municipal corporation such as a reclamation district, which debt is to be paid by the owners of the property within the district in proportion to the benefits which their lands receive from the work done, it is not within the power

of the legislature to transfer and impose this debt upon property not within the district at the time the original obligation was created, and which was not benefited by the work done. Thus it may be conceded that the legislature would have the power in such a case as this to impose the obligation of the debt of Old 70 upon New 70, but this transfer of the indebtedness would not make it a lien upon all the property of New 70, and when an assessment came to be made for the extinguishment of the debt, only the property of Old 70 benefited or supposedly benefited by the work which the indebtedness represented would be legally assessable for this debt."

The correctness of the views expressed in *Reclamation District v. Birks (supra)* was recognized by the court in its subsequent decision in *Barber v. Galloway* (1924), 195 Cal. 1. In that case the legislature created the Palo Verde Irrigation District (Stats. 1923, p. 1067), for the purpose of eliminating the inefficiencies and extra expense occasioned by the functions of a levee district, a drainage district and a mutual water company which were "separate and independent agencies." It was contended that the entire irrigation district was benefited by the maintenance of existing canals and levees and that the act was void in not spreading the burden therefor throughout the entire irrigation district. But the Supreme Court of California said (page 9):

> "We see no error in continuing the obligation as to the maintenance of existing levees upon the property found to be benefited thereby at the time that the district was originally created."

The court further pointed out that the act was valid, as it did not attempt to burden lands in the irrigation district lying outside of the limits of the former levee district or drainage district with the debts of these districts, it being said, at page 13:

> "The provision that the irrigation district shall assume all of the outstanding indebtedness of the former levee district, whether known or unknown, and also of the drainage district, contained in sections 12 and 13 of said act, are not violative of the rule laid down in the case of *Reclamation District v. Birks, supra*, for the reason that the statute does not purport to render land within the irrigation district and not within either the former levee district or drainage district liable for the debts of said district. It merely provides that the irrigation district shall enforce the payment of the debts of those districts to the same extent and in the same way that payment would have been enforced had those districts continued to exist."

Subsequent to the decision in *Barber v. Galloway (supra)*, the legislature amended the Palo Verde Irrigation District Act by adding section 15a (Stats. 1925, p. 637), which provides, in part, that:

> "It is therefore found, and the legislature does hereby declare, that all of the lands and improvements thereon within the boundaries of the Palo Verde irrigation district have been, are now, and will continue to be uniformly benefited by the strengthening, maintenance and operation of all exist-

ing levees, drains, and water system, as well as additions, extensions, or improvements thereof which may hereafter be constructed, maintained and operated, and should therefore bear the burden of the entire cost thereof upon a uniform basis."

Under the authority of section 15a, refunding bonds were voted at an election held in the irrigation district to take care of the bonds of the levee district, the drainage district and the mutual water system. The validity of the bonds was upheld in *Palo Verde Irrigation District v. Seeley* (1926), 198 Cal. 477, in view of the fact that the legislature had made an express declaration of benefit to the lands within the irrigation district, it being said, at pages 486, 487 and 488:

"Respondent insists, however, that the facts and decision in the instant case are practically identical with the facts and decision in the case of *Reclamation District No. 70 v. Birks*, 159 Cal. 233 [113 Pac. 170], and that the instant case is therefore covered and controlled by the latter case. * * * The question of what the situation would be had there been, as in the instant case, a legislative finding that the lands of the new district were benefited by the improvements of the old district was not discussed and obviously could not have been decided for the reason that that question was not then before the court. * * *

"In the instant case there is an express enactment by the legislature to the effect that all the lands within the irrigation district will be benefited by the

improvements of the old drainage district, the old levee district and the Palo Verde Mutual Water System. In the *Birks* case there was no such enactment. In the instant case express provision is made for the assumption of the debt of the old levee district by the new irrigation district by means of the issuance of refunding bonds. In the *Birks* case no such provision had been made. Therein lies the distinction and differentiation between the *Birks* case and the present case."

Such statements in *Palo Verde Irrigation District v. Seeley*, that:

> "The question of what the situation [in *Reclamation Dist. v. Birks*] would be had there been, as in the instant case, a legislative finding that the lands of ths new district were benefited by the improvements of the old district was not discussed and obviously could not have been decided for the reason that that question was not then before the court" (p. 487),

and

> "In the instant case there is an express enactment by the legislature to the effect that all the lands within the irrigation district will be benefited by the improvements of the old drainage district, the old levee district and the Palo Verde Mutual Water System. In the *Birks* case there was no such enactment" (p. 488),

show that the mere passage of an act by which the legislature itself sets up a new special assessment district to take over the maintenance and control of works of exist-

ing special assessment districts does not constitute a finding that the lands embraced within the larger newly created district are benefited by the works of the smaller district. If this be so, *a fortiori*, the enactment of a statute conferring discretionary power upon an administrative board to transfer to another special assessment district certain classes of structures classified only according to the authority under which they were constructed and maintained does not constitute a finding of benefit to the district to whom the burden is shifted.

Appellant respectfully submits that the correct rule was enunciated in *Reclamation District v. Birks (supra)*, 159 Cal. 233; *Barber v. Galloway (supra)*, 195 Cal. 1, and *Palo Verde Irrigation District v. Seeley (supra)*, 198 Cal. 477, and that the Supreme Court of California erred in not following that rule in the case at bar, particularly in view of the fact that the legislature, in effect left to the determination of the Board of Supervisors the question of fixing the boundaries of the district which is to bear the burden of the obligations of the drainage districts theretofore incurred.

POINT III.

The Supreme Court of the State of California Erred in Holding That Section 13½ of the Los Angeles County Flood Control District Act Refers to Specific Classes of Structures, the Nature of Which Indicates Their Relative Usefulness for the Purposes of the Flood Control District Without the Necessity of Any Express Declaration to Such Effect.

It is stated, in the decision of the Supreme Court of the State of California, that:

> "* * * Section 13½ * * * refers to the acceptance of a limited class of described property, namely, the specified storm drain improvements, drainage improvements, and drainage systems, which from the nature of such property indicates without any express declaration its relative usefulness for the purposes of the flood control district." [R. 22.]

The error in the foregoing statement, in so far, at least, as it applies to special assessment districts formed for drainage purposes, lies in the fact that (a) the validity of the special assessment drainage districts rests on the theory that they serve a purpose different from that of the Los Angeles County Flood Control District and are of benefit only to limited areas within the Flood Control District, and that (b) special assessment districts when formed are presumed to include within the district all lands which will be benefited by the improvements of the district.

(A) THE VALIDITY OF THE FORMATION OF DRAINAGE DISTRICTS WITHIN THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT RESTS ON THE THEORY THAT THEY SERVE A PURPOSE DIFFERENT FROM THAT OF THE FLOOD CONTROL DISTRICT AND ARE OF SPECIAL BENEFIT ONLY TO LIMITED AREAS WITHIN THE FLOOD CONTROL DISTRICT.

The Los Angeles Flood Control District was created in 1915. Drainage District No. 1 was not formed until 1917 and the forming of the district was attacked in *Van de Water v. Pridham* (1917), 33 Cal. App. 252, on the ground that the Los Angeles County Flood Control District Act made inoperative within the territory of that district the provisions of the 1903 drainage district statute (Stats. 1903, p. 354), under which Drainage District No. 1 was organized. In declaring that the drainage district statute was still in force and effect within the territory of the Los Angeles County Flood Control District, it was said, in that case, commencing at page 261:

> "* * * We are unable to perceive any merit whatsoever in this contention, and agree with counsel for petitioner that 'there is a radical difference between the purposes of the drainage act involved in this action and the said Los Angeles county flood control act. The purpose of the drainage act is to dispose of the water and get rid of it as an injurious element; while the purpose of the Los Angeles county flood control act is to conserve it as a beneficial agent.' The purpose of one is 'to promote the drainage of wet, swamp or overflowed lands'; the other, as de-

> clared by the first paragraph of section 2, is 'to provide for the control of the flood and storm waters of said district [which embraces practically the entire county of Los Angeles], and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district.' The fact that in the proceedings mention is made of the proposed drainage ditch as the 'construction of a storm drain,' which purpose it might at times serve, is in no wise inconsistent with the purpose declared in the act itself. Certainly it was not the intent of the Legislature that by creating a flood control district, embracing almost the entire county of Los Angeles, such act should repeal all provisions for the drainage of wet and swamp lands in the county, any more than by the act under which irrigation districts are created it was intended to destroy all acts providing for the drainage of swamp-lands embraced within such irrigation districts."

A similar situation was presented in *Moore v. Thornburg* (1930), 208 Cal. 657, wherein a statute providing for the formation of improvement districts within irrigation districts (Stats. of 1927, p. 1415) was held valid, it being said, at page 660:

> "Manifestly, this act was passed with the design to create elasticity in the government of irrigation districts so that special improvements independent of the general plan of improvement of the district might be made therein and the burden thereof rest solely upon the shoulders of those benefited thereby."

With the exception of Drainage Districts Nos. 1 and 3, the drainage districts involved were formed pursuant to the provisions of the Drainage District Improvement Act of 1919 [R. 2], a statute passed some five years subsequent to the creation of the Los Angeles County Flood Control District. The validity of the Drainage District Improvement Act of 1919, in so far as its application within the Los Angeles County Flood Control District is concerned, is sustainable only on the theory that it provides for the formation of special assessment districts for purposes other than that served by the Flood Control District and calculated to benefit only limited areas within the Flood Control District. Consequently, it seems illogical to say that property of such drainage districts is by its nature calculated to be of benefit to the entire Flood Control District.

(B) Only Lands Within a Special Assessment District Are Presumed to be Benefited by the Works of the District.

If the improvements of the respective drainage districts are in fact of benefit to the Flood Control District, all lands within the Flood Control District would have been included within the territory of each drainage district at the time it was established. That the limited areas within each of the drainage districts only are presumed to be benefited by the improvements of the respective districts results from the fact that no other lands were included within the boundaries of the respective drainage districts.

In *Moulton v. Parks* (1883), 64 Cal. 166, in pointing out that large bodies of land not within a levee district could not be included within levees constructed by the district, as the lands within the limits of the district can only be assessed for benefits conferred upon *such* lands, it was said, at page 181:

> "* * * The establishment of an assessment district is a declaration that the only lands which will be benefited by the proposed protection works, are the lands within the district."

This is particularly true of the drainage districts formed under the Drainage District Improvement Act of 1919 as it is provided in section 1 thereof that the boundaries of these districts "shall include all the lands which in the opinion of the county surveyor will be benefited by the improvement contemplated." Indulging in the presumption that "official duty has been regularly performed" (Cal. Code of Civil Procedure, sec. 1963, subd. 15), the conclusion follows that such drainage districts when formed included all lands that would be benefited by the works of the respective districts.

It is therefore apparent that section 13½ of the Los Angeles County Flood Control District Act does not refer to specific classes of structures of such a nature as to be presumptively of benefit to the Flood Control District.

POINT IV.

The Statute of the State of California, To-Wit, Statutes of 1937, Page 1763, Entitled, "An Act to Amend the 'Los Angeles County Flood Control Act,' by Adding Thereto a New Section, to Be Numbered 13½, Relating to the Conveyance and Transfer to Such District of Storm Drain Improvements, Drainage Improvements and Drainage Systems, for the Assumption of Liability for the Payment of Bonds of Drainage Districts Issued for the Construction of Storm Drain Improvements, Drainage Improvements and Drainage Systems So Conveyed and Transferred, for the Operation, Maintenance and Repair of Such Storm Drain Improvements, Drainage Improvements and Drainage Systems and the Levy of a Special Tax Therefor," Approved June 29, 1937, Is Unconstitutional and Repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in That It Deprives Appellant of His Property Without Due Process of Law.

From what has been stated under the preceding points, to appellant the conclusion seems inescapable that section 13½ of the Los Angeles County Flood Control Act is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States. This conclusion cannot be avoided by resort to judicial construction or interpretation as the defect is inherent in the statute itself, in that it authorizes an administrative board to fix the boundaries of a special assessment district and levy special assessments without providing for a hearing and determination of special benefit to the lands assessed. No matter how the statute may be construed, this fact can-

not be avoided. It is immaterial that authority to enact such a statute may or may not be found in the state constitution, as the Constitution of the United States is paramount to state constitutions, as well as state statutes. (*Lent v. Tillson,* 140 U. S. 316, 330; *McCulloch v. State of Maryland,* 17 U. S. 316, 406; see, also *Hershey v. Cole,* 130 Cal. App. 683, 687.) The contentions of appellant cannot be met by resort to construction of the statute, for, as stated by this Honorable Court in *Corn Products Refining Co. v. Eddy* (1918), 249 U. S. 427, 432:

> "* * * In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261; Mountain Timber Co. v. Washington, 243 U. S. 219, 237, 61 L. ed. 685, 696, 37 Sup. Ct. Rep. 260, 13 N. C. C. A. 927; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126."

CONCLUSION.

In conclusion, it is respectfully submitted that section 13½ of the Los Angeles County Flood Control District Act [Stats. 1915, p. 1502, as amended by Stats. 1937, p. 1763] is violative of the rights of appellant as guaranteed by article XIV of the Amendments to the Constitution of the United States, in that it permits his property to be taken without due process of law; and that the judgment of the Supreme Court of the State of California sustaining the validity of the statute as against the assertion of its repugnancy to article XIV of the Amendments to the Constitution of the United States should be reversed.

Respectfully submitted,

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